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IN THE

Supreme Court of the United States

October Term, 1936

No. 37

THE BRITISH AMERICAN OIL PRODUCING COMPANY, a Corporation,

Petitioner,

v.

THE BOARD OF EQUALIZATION of the State of Montana, and JAMES H. STEWART, JOHN J. GREENE, and SAM D. GOZA, members of the State Board of Equalization of the State of Montana,

Respondents.

Brief of Respondents

RAYMOND T. NAGLE,
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THUNDER'S, HELENA

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THE BOARD OF EQUALIZATION of the State of Montana, and JAMES H. STEWART, JOHN J. GREENE, and SAM D. GOZA, members of the State Board of Equalization of the State of Montana,

Respondents.

THE BLACKFEET INDIAN TRIBE,

Intervener.

Brief of Respondents

STATEMENT OF RESPONDENTS' POSITION.

The position of respondents is (a) that the Blackfeet Reservation is an executive order Indian reservation; (b) that the minerals reserved to the United States from trust patents issued to individual members of the Blackfeet tribe are unallotted lands, and (c) that under the provisions of Sections 398a, 398b, and 398c, 25 U. S. C.

A., the state taxes complained of in petitioner's brief are properly collectible. Should it be determined, however, that the Blackfeet Reservation is not an executive order Indian Reservation, it is the position of respondents (a) that the lease in question was executed under the authority of Section 398, 25 U. S. C. A.; (b) that in any event the petitioner is estopped from claiming it was not, and (c) that the state taxes complained of are properly collectible.

ARGUMENT.

History of Blackfeet Indian Reservation.

On the 17th day of October, 1855, a treaty was concluded between the United States and certain nations, tribes and bands of Indians, including the Blackfeet tribe. It was ratified by the Senate on April 15, 1856, and proclaimed by the President on April 25, 1856. Under its provisions the nations, tribes and bands affected were granted certain rights and privileges in the use and enjoyment of large tracts of land in the then Territory of Nebraska but now within the boundaries of the State of Montana (2 *Kappler's Indian Affairs* 552; 11 Stat. 657). By executive order of President Grant, made on July 5, 1873, certain described lands in the then Territory of Montana were set apart as a reservation for the Blackfeet and kindred tribes of Indians, as recommended by the Secretary of the Interior and the Commissioner of Indian Affairs. By executive order of President Grant, made on August 19, 1874, so much of these lands was restored to the public domain as to make what remained correspond with the tract set apart by Act of Congress of April 15, 1874, (18 Stat. 28) for the same purpose. By executive order of President Grant, made

on April 13, 1875, certain lands in the Territory of Montana were set apart as an addition to the existing reservation for the Blackfeet and kindred tribes of Indians. By executive order of President Hayes, made on July 13, 1880, a part of this addition was restored to the public domain (1 *Kappler's Indian Affairs* 855-857). In accordance with an agreement made between representatives of the government and the Indians concerned the reservation was further reduced in area by an Act of Congress passed on May 1, 1888 (1 *Kappler's Indian Affairs* 261, 25 Stat. 113). Finally, under an agreement entered into on the 26th day of September, 1895, between representatives of the government and the Indians of the Blackfeet Reservation and ratified by Congress on the 10th day of June, 1896, a considerable portion of the reservation as it then existed was ceded to the United States (1 *Kappler's Indian Affairs* 604; 29 Stat. 353).

SECTIONS 397, 398, 398a, 398b, AND 398c, 25 U. S. C. A.

Sections 397, 398, 398a, 398b, and 398c, of Title 25, United States Code Annotated, read as follows:

> "Section 397. Leases of lands for grazing or mining. Where lands are occupied by Indians who have bought and paid for the same, and which lands are not needed for farming or agricultural purposes, and are not desired for individual allotments, the same may be leased by authority of the council speaking for such Indians, for a period not to exceed five years for grazing, or ten years for mining purposes in such quantities and upon such terms and conditions as the agent in charge of such reservation may recommend, subject to the approval of the Secretary of the Interior. (Feb. 28, 1891, c. 383, § 3, 26 Stat. 795.)

"Section 398. Leases of unallotted lands for oil and gas mining purposes. Unallotted land on Indian reservations other than lands of the Five Civilized Tribes and the Osage Reservation subject to lease for mining purposes for a period of ten years under section 397 of this title may be leased at public auction by the Secretary of the Interior, with the consent of the council speaking for such Indians, for oil and gas mining purposes for a period of not to exceed ten years, and as much longer as oil or gas shall be found in paying quantities, and the terms of any existing oil and gas mining lease may in like manner be amended by extending the term thereof for as long as oil or gas shall be found in paying quantities: *Provided*, That the production of oil and gas and other minerals on such lands may be taxed by the State in which said lands are located in all respects the same as production on unrestricted lands, and the Secretary of the Interior is authorized and directed to cause to be paid the tax so assessed against the royalty interests on said lands: *Provided, however*, That such tax shall not become a lien or charge of any kind or character against the land or the property of the Indian owner. (May 29, 1924, c. 210, 43 Stat. 244.)

"Section 398a. Leases of unallotted lands for oil and gas mining purposes within executive order Indian reservations. Unallotted lands within the limits of any reservation or withdrawal created by Executive order for Indian purposes or for the use or occupancy of any Indians or tribe may be leased for oil and gas mining purposes in accordance with the provisions contained in section 398 of this title. (Mar. 3, 1927, c. 299, § 1, 44 Stat. 1347.)

"Section 398b. Same; proceeds from rentals, royalties, and bonuses; disposition. The proceeds from rentals, royalties, or bonuses of oil and gas leases upon lands within Executive order Indian reservations or withdrawals shall be deposited in

the Treasury of the United States to the credit of the tribe of Indians for whose benefit the reservation or withdrawal was created or who are using and occupying the land, and shall draw interest at the rate of 4 per centum per annum and be available for appropriation by Congress for expenses in connection with the supervision of the development and operation of the oil and gas industry and for the use and benefit of such Indians: *Provided*, That said Indians, or their tribal council, shall be consulted in regard to the expenditure of such money, but no per capita payment shall be made except by Act of Congress. (Mar. 3, 1927, c. 299, § 2, 44 Stat. 1347.)

"Section 398c. Same; taxes. Taxes may be levied and collected by the State or local authority upon improvements, output of mines or oil and gas wells or other rights, property, or assets of any lessee upon lands within Executive order Indian reservations in the same manner as such taxes are otherwise levied and collected, and such taxes may be levied against the share obtained for the Indians as bonuses, rentals, and royalties, and the Secretary of the Interior is hereby authorized and directed to cause such taxes to be paid out of the tribal funds in the Treasury: *Provided*, That such taxes shall not become a lien or charge of any kind against the land or other property of such Indians. (Mar. 3, 1927, c. 299, § 3, 44 Stat. 1347.)"

BLACKFEET INDIAN RESERVATION IS AN EXECUTIVE ORDER RESERVE.

The Act of Congress of April 15, 1874, but recognized and confirmed in a sense the order of President Grant establishing and delimiting the Blackfeet Indian Reservation. It is an executive order Indian reservation (*Spalding v. Chandler*, 160 U. S. 394, 40 L. Ed. 469;

Minnesota v. Hitchcock, 185 U. S. 373, 46 L. Ed. 954; *Donnelly v. United States*, 228 U. S. 243, 57 L. Ed. 820; *United States v. Midwest Oil Co.*, 236 U. S. 459, 59 L. Ed. 673; 17 Ops. Atty. Gen. 258; 33 Land Dec. 205). It is listed as such with one hundred thirty-two others in the index to 1 *Kappler's Indian Affairs* at page 1102. It also occupies a place, with many more of like character, in the annual report of the Commissioner of Indian Affairs for 1886, under the heading "Executive Orders Relating to Indian Reservations", pages 292-380. It is noteworthy that the Shoshone, the Flathead, the Osage and hundreds of other Indian reservations are not mentioned in either volume as executive order reservations. Moreover, before the reservation was established by President Grant in 1873 there was no Blackfeet Indian Reservation in the real sense. It is reasonable to assume, therefore, that when Congress enacted Sections 398a, 398b, and 398c, 25 U. S. C. A., it had in mind reservations of the Blackfeet Indian type.

LEASE MADE UNDER AUTHORITY OF 43 STAT. 244.

The lease in question is denominated an "Oil and Gas Mining Lease, Tribal Indian Land", and was made under the authority of 43 Stat. 244 (Sec. 398, 25 U. S. C. A.) according to its own terms (R. 7). As the lease shows (R. 6) and the complaint avers (R. 2) and as Section 398 in fact requires, the lease was entered into with the consent of the Blackfeet Tribal Council. It was executed by the Superintendent of the Blackfeet Indian Reservation, as lessor, in behalf of the Blackfeet Tribe of Indians, and the Consolidated Gas Company, as lessee. It was duly approved by the First Assistant Secretary of the Interior (R. 2, 14) and afterwards assigned by the lessee to the petitioner herein (R. 2, 14). The assign-

ment was approved by the Assistant Secretary of the Interior (R. 3, 16). Thereafter, pursuant to the terms and provisions of the lease the petitioner entered upon the leased premises and proceeded to develop the same for oil and gas purposes and the production of crude oil, and did in fact drill thereon to completion ten wells which are producing petroleum in paying quantities (R. 3).

In executing the lease it was proper to proceed under the provisions of Section 398. The oil and gas, as well as all other minerals, were reserved to the United States for the benefit of the Blackfeet Tribe of Indians (41 Stat. 17) from the trust patents issued to the individual members of the tribe, and to the extent of that reserved interest the Indian lands, of necessity, remained unallotted. Two estates were created, one in the surface and the other in the minerals beneath the surface (*Taylor v. Tayrien*, 51 Fed. (2d) 884, cert. denied 284 U. S. 672; *Adams v. Osage Tribe of Indians*, 59 Fed. (2d) 653, cert. denied 287 U. S. 652, 653; *British-American Oil P. Co. v. Board of Equalization*, 101 Mont. 293, 54 Pac. (2d) 129). These mineral resources are not attached to the land, allotted in severalty, but these rights and reserves are tribal interests and not interests in severalty. The mineral reserves were not divided in severalty. The owner of the land of such a Blackfeet allotment does not individually own the minerals thereunder. These reserves remain as tribal property. There is no difference in principle between a lease of minerals underneath unallotted lands and a lease of minerals underneath allotted lands from which the minerals have been reserved. In the one case, as in the other, the minerals are held by the United States for the benefit of the Blackfeet Indians in their tribal capacity. That must have been the view

which Congress entertained when it enacted Section 398. From the language of the section it is obvious that Congress intended that the production of oil and gas from areas underneath restricted lands, that is lands for which trust patents had issued, should be placed in the same category as the production of oil and gas from areas underneath unrestricted lands, so far as taxation by the state is concerned. If the section was meant to apply only to "unallotted lands", as the term is ordinarily understood, why was Congress at pains to provide that the tax shall not become a lien or charge of any kind or character against the land of the Indian owner? Surely, so far as unallotted lands are concerned, it was not necessary to insert a provision of that kind in order to protect the tribe or any member of the tribe against tax liens.

Mid-Northern Oil Co. v. Walker, 268 U. S. 45, 45 S. Ct. 440, 69 L. Ed. 841.

MINERALS IN PLACE ARE LAND.

It is a well settled principle that minerals in place are land.

Huss v. Jacobs, 210 Pa. 145, 59 Atl. 991;
Selvey v. Grafton Coal & Coke Co., 72 W. Va. 680, 79 S. E. 656;
Kinder v. LaSalle County Carbon Coal Co., 301 Ill. 362, 133 N. E. 772;
Young v. Young, 307 Mo. 218, 270 S. W. 653, 39 A. L. R. 734;
Stern v. Great Southern Land Co., 148 Miss. 649, 114 South. 739.

SECTION 398 CONSTRUED BY EXECUTIVE DEPARTMENT.

Section 398 has been construed by the executive department of government charged with its administration. The courts have uniformly held that the construction placed upon a statute by the officer, board or department charged with the duty of administering it is entitled to great weight and should not be overturned except for cogent reasons.

59 *Corpus Juris* 1025;
United States v. Jackson, 280 U. S. 183, 50 S. Ct. 143, 74 L. Ed. 361;
Federal Land Bank v. Warner, 292 U. S. 53, 54 S. Ct. 571, 78 L. Ed. 1120;
Globe Indemnity Co. v. Bruce, 81 Fed. (2d) 143.

The statements of the First Assistant Secretary of the Interior and the Commissioner of Indian Affairs (Pet. brief 29, 30), made apparently with the view of bolstering the position of the petitioner and coming as they did after the controversy had arisen, are not entitled to any consideration.

UNALLOTTED LANDS OF THE FIVE CIVILIZED TRIBES AND THE OSAGE RESERVATION ONLY EXCEPTED FROM SECTION 398.

It will be observed that unallotted lands on all Indian reservations but those of the Five Civilized Tribes and the Osage Reservation come under the provisions of Section 398. Certain designated exceptions having been made by the statute, it must be held to be all-embracing otherwise.

2 *Lewis' Sutherland Stat. Constr.* sec. 494, p. 923;
59 *Corpus Juris* 1092;
25 *Ruling Case Law* 983, Sec. 230;
Federal Crude Oil Co. v. Yount-Lee Oil Co., 122 Tex. 21, 52 S. W. (2d) 56;
Evans v. McCabe, 164 Tenn. 672, 52 S. W. 159;
Brahmey v. Rollins, 179 Atl. (N. H.) 186.

SECTION 10 OF CHAPTER 4, ACT OF JUNE 30, 1919, AND SECTION 398, 25 U. S. C. A., SHOULD BE CONSTRUED TOGETHER.

Section 10 of Chapter 4, Act of June 30, 1919 (41 Stat. 17), and Section 398, 25 U. S. C. A. (43 Stat. 244), relating as they do to the same subject, should be construed together (59 C. J. 1042), and to the extent of any conflict between them the latter modifies or qualifies the former (59 C. J. 1051). Under the Act of June 7, 1897 (30 Stat. 62, 72), Quapaw Indians were empowered to lease their lands for farming or grazing purposes for a term of three years or for mining purposes for a term of ten years. Under the Act of March 3, 1909 (Sec. 396, 25 U. S. C. A.), Indians generally, except members of the Five Civilized Tribes and Osage Indians in Oklahoma, were empowered to lease their lands for mining purposes for any term of years, with the consent of the Secretary of the Interior. In *Hallam v. Commerce Mining & Royalty Co.*, 49 Fed. (2d) 103, cert. denied 284 U. S. 643, it was held that Quapaw Indians were entitled to the benefit of Section 396 and so authorized to lease their lands for mining purposes under its provisions with the consent of the Secretary of the Interior.

THE PROVISIONS OF SECTION 398c APPLICABLE.

The Blackfeet Reservation being an executive order Indian reservation, the provisions of Section 398c are applicable to every phase of the controversy without regard to the particular statute under the authority of which the lease was made.

Hudson Oil Co. v. Board of County Com'rs, 49 Wyo. ....., 52 Pac. (2d) 683.

THE PETITIONER IS ESTOPPED.

But should it be determined by the Court that the Blackfeet Reservation is not an executive order Indian reservation and be conceded by the respondents, which it is not, that the lease could not properly be made under the provisions of Section 398, still it must be remembered that this action was not brought to reform or cancel the same (*United States v. Noble*, 237 U. S. 74, 59 L. Ed. 844; *Smith v. McCullough*, 270 U. S. 456, 70 L. Ed. 682). On the contrary, the petitioner is standing upon it, though at the same time desperately attempting to straddle the issues involved. The petitioner, as the assignee of the Consolidated Gas Company, took the lease as it found it and cannot now change its position to its own advantage. It accepted the lease with its benefits as well as its obligations. Under the circumstances the petitioner should not be heard to say that the lease is all right so far as the production of oil and gas is concerned, but is ineffective when it comes to taxation affecting such production. The petitioner is therefore estopped from denying the recital in the lease to the effect that it was made under the authority of 43 Stat. 244 (Sec. 398, 25 U. S. C. A.).

2 *Cooley on Taxation*, secs. 803, 834, 899;
61 *Corpus Juris* 250, Sec. 237;
21 *Corpus Juris* 1091, secs. 70, 73;
Phillips v. Payne, 92 U. S. 130, 23 L. Ed. 649;
Superior Coal Co. v. Musselshell County, 98 Mont. 501, 41 Pac. (2d) 14;
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Society For Establishing Useful Manufactures v. Paterson, 89 N. J. Law 208, 98 Atl. 440;
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United States v. Southern Oregon Co., 196 Fed. 423;
Day v. Simms Oil Co., 23 Fed. (2d) 923;
People v. State Board of Tax Com'rs, 160 App. Div. 771, 146 N. Y. S. 112;
In re Cronin's Will, 257 N. Y. S. 496.

The cases of *Hemmer v. United States*, 204 Fed. 898; *United States v. Saunders*, 96 Fed. 268; *Frazee v. Piper*, 98 Pac. 760, and *Felix v. Yaksum*, 137 Pac. 1037, cited in petitioner's brief at page 31, are not in point. The questions before the court in each of them are altogether dissimilar to the questions involved here.

A STATE MAY, WITH THE CONSENT OF CONGRESS, TAX AN INSTRUMENTALITY OF THE UNITED STATES.

A state may, with the consent of Congress, lay a tax on the instruments, means or agencies, provided or selected by the government of the United States to enable

it to carry into execution its legitimate powers and functions. National banks are a good example of the exercise of such consent.

61 *Corpus Juris* 371;
2 *Cooley on Taxation*, sec. 606, p. 1286;
Mid-Northern Oil Co. v. Walker, 65 Mont. 414, 211 Pac. 353, aff. 268 U. S. 45, 69 L. Ed. 841.

Congress has the power to grant to the states the right to tax public property or property in which the United States retains such an interest as would otherwise exempt it, and where, as here, this is done no express acceptance by the state of the authority conferred is essential to the exercise thereof.

61 *Corpus Juris* 361;
Central Pacific Railroad Co. v. Nevada, 162 U. S. 512, 16 S. Ct. 885, 40 L. Ed. 1057, aff. 21 Nev. 247, 30 Pac. 686.

Apparently the petitioner has abandoned its claim that the corporation license tax imposed by the State of Montana is invalid as no mention thereof is made in petitioner's brief (R. 5, 6).

We respectfully submit that the decree of the Supreme Court of Montana should be affirmed.

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